00751

1985/11/00

United States General Accounting Office

GAO

Briefing Report
To The Honorable John Glenn
U.S. Senate

November 1985

NUCLEAR AGREEMENT

Cooperation Between the United States and the People's Republic of China

GAO/NSIAD-86-21BR

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

NATIONAL SECURITY AND
INTERNATIONAL AFFAIRS DIVISION

November 27, 1985

B-220958

The Honorable John Glenn
United States Senate

Dear Senator Glenn:

In response to your letter of October 10, 1985, we examined the proposed Agreement for Cooperation between the United States and the People's Republic of China Concerning the Peaceful Uses of Nuclear Energy. We focused on identifying whether potential problems might arise because the agreement contained vague language and undefined terms.

We also reviewed the Senate bill (S. 1754, 99th Congress), which proposes clarifications of certain aspects of this agreement; and compared that bill to a related joint resolution (H.J.Res. 404, as reported/S.J.Res. 238, 99th Congress), which was passed by the Senate on November 21, 1985, and is being considered by the House.

In brief, although we found nothing in the agreement which should preclude congressional approval, the agreement does contain certain vague and unclear language which could lead to misinterpretations. In several respects the language in this agreement differs from that in other nuclear cooperative agreements, but for the most part these differences appear to have more symbolic than practical effects. Nevertheless, the changes represent a departure from the long-standing U.S. practice of encouraging more stringent controls on the use of U.S. nuclear exports.

You asked specifically about the nonproliferation credentials of the People's Republic of China (PRC). Although we are providing some general information on the subject, we were not able to reach conclusions because the CIA denied our requests for relevant intelligence information on PRC nuclear activities.

The joint resolution and the Senate bill both address many of the same issues. In our opinion, the passage of the Senate bill would substantially change the conditions under which the PRC entered into the agreement and would likely adversely affect implementation of the agreement. The proposed joint resolution may be more palatable to the PRC because, unlike S. 1754, it

requires action from the President rather than the Chinese government. However, neither the bill nor the resolution redresses the agreement's unclear and vague wording, which may lead to misunderstandings or misinterpretations. These findings are discussed in detail in appendixes I and II.

In conducting our review, we met with officials from the Departments of State, Energy, and Defense; the U.S. Arms Control and Disarmament Agency; and the Nuclear Regulatory Commission. We reviewed previously concluded nuclear cooperation agreements and applicable laws and treaties. State Department officials discouraged us from contacting the Chinese Embassy to discuss the agreement because, in their opinion, "it would not be in the best interest of all parties" and no Chinese embassy official was familiar with the negotiations.

As agreed with your office, we did not request official agency comments on this report. However, the views of directly responsible officials were sought during the course of our work and are incorporated in this report where appropriate. Also, we are sending copies of this report to the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs; the Secretaries of State, Defense, and Energy; the Director, Arms Control and Disarmament Agency; the Chairman, Nuclear Regulatory Commission; and other interested parties on request.

If we can be of further assistance, please let us know.

Sincerely,

Frank C. Conahan

Frank C. Conahan
Director

APPENDIX I

AGREEMENT FOR COOPERATION BETWEEN THE UNITED STATES AND THE PEOPLE'S REPUBLIC OF CHINA

On April 30, 1984, representatives of the United States and the People's Republic of China (PRC) initialed an agreement for nuclear cooperation. Due to congressional concerns over several reported provisions, the executive branch held additional discussions with the Chinese government to clarify PRC nonproliferation policies. The agreement was then submitted to the Congress on July 24, 1985. Unless a joint resolution of the Congress is adopted and enacted which specifically states that the Congress does not favor the proposed agreement (the congressional deadline to do so expires around December 11, 1985), this agreement will go into effect following an exchange of notes between the two governments.

As authorized in the Atomic Energy Act of 1954, as amended, agreements for cooperation are a precondition for export or transfer of nuclear material, information, technology, facilities, and components to other nations. These agreements generally do not legally commit the United States to make such exports but rather provide the framework under which exports can occur. Legal commitments for exports exist only with the conclusion of specific supply contracts and the issuance of specific licenses for such exports.

The proposed U.S./PRC agreement allows the transfer of low enriched uranium (non-weapons-grade material) for power reactors and specifies that all exchanges are to be for peaceful purposes. The agreement does not allow the transfer of sensitive nuclear technology nor does it allow the transfer of weapons grade materials. Estimates of potential U.S. sales under this agreement range from $3 billion to $7 billion.

According to one industry expert, if ground were broken today, it would probably be 6 or 7 years before a PRC nuclear power reactor would be operational. Two more years, at least, would pass before the first fuel was "burned" and ready for cooling. Cooling would take at least another year before the fuel could be reprocessed. The official added that this 10-year scale does not include contract negotiations. Because of this long time lag, executive branch officials say they will have sufficient time to observe PRC actions under the agreement before sensitive issues, such as reprocessing, arise.

This report addresses the concerns raised in your request letter, specifically your questions about the following provisions:

--Article 2's use of the term "treaty" instead of agreement,

--Article 5's language concerning consent rights, and

--Article's 8's discussion on consultations.

In addition, this document discusses PRC's nonproliferation credentials, and examines the bill (S. 1754, 99th Congress) and the joint resolution (H.J.Res. 404, as reported/S.J.Res. 238, 99th Congress) pertaining to the Cooperation Agreement.

ARTICLE 2, SECTION 1

This section of the proposed agreement reads as follows:

> "The parties shall cooperate in the use of nuclear energy for peaceful purposes in accordance with the provisions of this agreement. Each party shall implement this agreement in accordance with its respective applicable treaties, national laws, regulations and license requirements concerning the use of nuclear energy for peaceful purposes. The parties recognize, with respect to the observance of this agreement, the principle of international law that provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." (Emphasis added.)

You specifically questioned the introduction of the term "treaty" in this section. According to executive branch officials, the word "treaty" does not alter the legal status of this agreement. We concur.

The international law principle emphasized in article 2 above states that a party may not invoke a change in its internal law as a justification for not fulfilling its international obligation. Because international law does not distinguish between agreements designated as "treaties" and "other agreements," this principle applies equally to both. Introduction of the word "treaty" would not alter this. Article 2 would make this principle explicitly applicable to the U.S./PRC agreement regardless of the fact that the agreement is not a formal treaty. However, it would not change the domestic legal status of the agreement.

In addition to focusing on the implications of the term "treaty," we examined the overall language used in this section and found it different from that used in prior U.S. nuclear cooperation agreements. In particular, we focused on the third sentence, which explicitly states that domestic law may not be used as a justification for failure to perform a treaty. Such explicit language does not appear in other agreements. As a result, there has been some concern that this statement may frustrate the ability of the Congress and the President to pass future legislation that may be inconsistent with the agreement.

According to executive branch officials, the third sentence sets forth a well-established principle of international law which would apply to the agreement whether or not it was explicitly stated. The executive branch position is that the principle does not "qualify or reduce" the ability of Congress to pass future legislation. Furthermore, executive branch officials believe the second sentence affirms the U.S. position that U.S. exports will be subject to U.S. law in effect at the time they are made.

To understand this section, one needs to recognize that there are differences between international law and U.S. domestic law: what holds under one does not necessarily hold under the other. Under international law, a change in domestic law does not relieve a country of its international obligations. This customary principle of international law was codified as article 27 of the Vienna Convention on the Law of Treaties, and although the United States has not ratified the Convention, the executive branch strongly contends that it represents U.S. policy.

The inclusion of the third sentence introduces some confusion as to its effect on sentence two of the article. Nevertheless, the explicit statement of international principle does not, in our opinion, impair the ability of the Congress or the President to enact or implement future legislation in the nuclear area which is inconsistent with the agreement. A later enacted statute under U.S. domestic law would supersede a clearly inconsistent prior international agreement, even if the later law may be viewed as a violation of international law.

Potential implications

Although it would have no practical effect in barring future internal actions, the explicit language used in this section may cause future problems:

--It would preclude the United States from asserting a defense of noncompliance based on a change in U.S. law.

--It could give rise to misunderstandings between the United States and China.

--It may create a political or symbolic barrier to future action.

If a breach were to occur under other cooperation agreements which do not explicitly recognize the international principle, the United States could assert a change in internal law as its defense; it would then be up to an international forum to decide the question, based on the international principle and the specific language of the agreement. However, since the principle is expressly written into the U.S./PRC agreement, the United States could not introduce in an

international forum a later enacted internal law as a defense for noncompliance.

The language in this article could also be subject to various interpretations, thus giving rise to misunderstandings. Executive branch officials say that the PRC wanted the international principle explicitly stated to avoid future legislation similar to the Nuclear Non-Proliferation Act of 1978 (NNPA). Many countries were disturbed when the United States passed the NNPA because it changed the export rules and the conditions required for agreements for cooperation. As discussed above, this agreement would not rule out future legislation.

Another potential impact involves future political constraints on the Congress. Congress may feel politically pressured against passing legislation that would cause the United States to be in violation of a provision of the PRC agreement, given the explicit statement of this principle in the agreement.

ARTICLE 5, SECTION 2

This section of the proposed agreement specifies that neither party has any plans to enrich, reprocess, alter in form, or retransfer any materials transferred pursuant to the agreement. In the event that either party wishes to undertake one of these activities, this section requires the parties' agreement before the activity can be undertaken. In addition, this section establishes a consultative process through which mutual agreement can be sought. The entire process is commonly referred to as consent rights.

This section of the proposed agreement reads as follows:

"Neither party has any plans to enrich to twenty percent or greater, reprocess, or alter in form or content material transferred pursuant to this agreement or material used in or produced through the use of any material or facility so transferred. Neither party has any plans to change locations for storage of plutonium, uranium 233 (except as contained in irradiated fuel elements), or high enriched uranium transferred pursuant to this agreement or used in or produced through the use of any material or facility so transferred. In the event that a party would like at some future time to undertake such activities, the parties will promptly hold consultations to agree on a mutually acceptable arrangement. The parties undertake the obligation to consider such activities favorably, and agree to provide pertinent information on the plans during the consultations. Inasmuch as any

APPENDIX I

such activities will be solely for peaceful purposes and will be in accordance with the provisions of this agreement, the parties will consult immediately and will seek agreement within six months on long-term arrangements for such activities. In the spirit of cooperation the parties agree not to act within that period of time. If such an arrangement is not agreed upon within that period of time, the parties will promptly consult for the purpose of agreeing on measures which they consider to be consistent with the provisions of the agreement in order to undertake such activities on an interim basis. The parties agree to refrain from actions which either party believes would prejudge the long-term arrangements for undertaking such activities or adversely affect cooperation under this agreement. The parties agree that the consultations referred to above will be carried out promptly and mutual agreement reached in a manner to avoid hampering, delay or undue interference in their respective nuclear programs. Neither party will seek to gain commercial advantage. Nothing in this article shall be used by either party to inhibit the legitimate development and exploitation of nuclear energy for peaceful purposes in accordance with this agreement." (Emphasis added.)

Concern about vague, different language

Certain language in this article is different from that of other agreements entered into after the NNPA. Consent rights language in other post-NNPA agreements generally states that the other country cannot undertake specified activities, such as reprocessing, "without the approval" of the United States. Even in the agreements with Sweden and Norway, which give limited generic or "blanket" approval for reprocessing, the United States has retained language specifying that it can withdraw its approval at any time, based on nonproliferation concerns or national security.

While the executive branch contends that the proposed agreement with the PRC makes clear that U.S. approval is necessary if the PRC wishes to undertake such activities, the proposed agreement contains phrases and additional wording not found in prior agreements. (See underscoring in text.) The agreement also contains several undefined and unclear provisions which could lead to misinterpretations. For example, the agreement does not define "long-term arrangements" and "interim basis," nor does it spell out how these arrangements relate to procedures set up under the NNPA. The use of new or undefined wording has led to concerns that the proposed agreement

APPENDIX I

--creates the impression that the United States is obligated to favorably respond to PRC requests to reprocess, enrich, retransfer, or alter nuclear materials, or to change storage locations;

--appears to establish new standards or criteria for the export approval process beyond those set forth in the NNPA (for example, avoiding "delays or undue interference" in a party's nuclear program); and

--leaves unanswered questions about the congressional role in approving long-term arrangements. (Congress is involved in subsequent arrangements as defined within the NNPA, but it is unclear whether there is a difference between "subsequent" and "long-term" arrangements.)

According to executive branch officials, the changes are more symbolic than practical. They see nothing in the language that would constrain or prohibit the United States from protecting its best interests. Executive branch officials said the agreement does not add any new criteria, that the congressional role in reviewing subsequent arrangements is unchanged, and that the Chinese cannot undertake such actions as reprocessing without U.S. consent, including appropriate prior congressional review.

We concur that article 5 of the agreement does not alter the legal requirements of the NNPA, and does not preclude the United States from reaching a negative decision on an export request. However, we believe the particular language may

--result in the need to more strongly justify disapprovals (the predisposition is presumed to be a positive response),

--cause misunderstandings (even though State Department officials believe that the Chinese recognize that the different wording does not connote a departure from U.S. policy), and

--be precedent setting in that pressure would build for similar type language in other agreements.

Regarding the last point, Japan and EURATOM (the European Atomic Energy Community) have refused to renegotiate their agreements for cooperation with the United States because of disagreement over the U.S. prior approval provisions of the NNPA. The language in article 5 of the proposed U.S./PRC agreement could further complicate U.S. efforts to renegotiate

those agreements unless the United States is willing to give similar terms to Japan and EURATOM.

ARTICLE 8, SECTION 2

The proposed agreement does not include safeguards but instead refers to "mutually acceptable arrangements" for exchanges of information and visits. The pertinent section, entitled "Consultations," reads as follows.

> "The parties recognize that this cooperation in the peaceful uses of nuclear energy is between two nuclear-weapon states and that bilateral safeguards are not required. In order to exchange experience, strengthen technical cooperation between the parties, ensure that the provisions of this agreement are effectively carried out, and enhance a stable, reliable, and predictable nuclear cooperation relationship, in connection with transfers of material, facilities and components under this agreement the parties will use diplomatic channels to establish mutually acceptable arrangements for exchanges of information and visits to material, facilities and components subject to this agreement." (Emphasis added.)

Safeguards are intended to deter use of nuclear materials or facilities to further any military or other explosive purpose. Under the Nuclear Non-Proliferation Treaty, nonnuclear weapon states are required to have safeguards developed by the International Atomic Energy Agency (IAEA). The treaty defines nuclear weapon states as those which had manufactured and exploded a nuclear explosive device prior to January 1, 1967--meaning the United States, USSR, United Kingdom, France, and PRC. India, for example, is not a recognized nuclear weapon state because it exploded its nuclear device in 1974.

The NNPA requires that nonnuclear weapon states have IAEA safeguards. The NNPA does not set a similar requirement for nuclear weapon states. The NNPA does specify "a guaranty by the cooperating party that safeguards as set forth in the agreement for cooperation will be maintained...." In the case of the U.S./PRC agreement, in which specific safeguards are not required, U.S. officials point to the consultation process and potential exchanges of information and visits as going beyond NNPA requirements. They compare the consultations to the physical security visits currently performed by the Department of Energy with various trading partners which aid in assessing export license requests. (See our report entitled Obstacles to U.S. Ability to Control and Track Weapons-Grade Uranium Supplied Abroad, GAO/ID-82-21, Aug. 2, 1982, for further discussions about physical security visits.)

APPENDIX II

ANALYSIS AND COMPARISON OF BILL AND RESOLUTION

We believe that S. 1754, 99th Congress, would address only some of the concerns expressed in your letter. Based on the available data, we believe that passage of the bill would change conditions under which the PRC entered into the agreement and would likely adversely affect implementation of the agreement.

The joint resolution (H.J.Res. 404, as reported/S.J.Res. 238, 99th Congress) addresses many of the same issues as those addressed by S. 1754, though in a different way. In addition, the resolution stipulates that nothing in the agreement or the resolution may be construed as providing a precedent or other basis for negotiation or renegotiation of any other agreement for nuclear cooperation. The resolution also requires that the President submit to the Speaker of the House and the Chairman of the Senate Committee on Foreign Relations a report detailing the history and current developments in PRC nonproliferation policies and practices.

We believe that the resolution would be more palatable than the bill to the Chinese because it does not require them to take public, written, and detailed actions; rather it requires, at the most, that the PRC provide additional information. The greater requirement is placed upon the President. Between the bill and resolution, the executive branch would favor the resolution since it places less stringent requirements upon the PRC.

The Senate bill requires the President to make four certifications before export licenses can be issued. The resolution requires three. Moreover, as stated above the resolution requires the President to submit a report on PRC nonproliferation policy and practices to the Congress and specifies that the agreement is not precedent setting. In addition, the resolution states that each proposed export be subject to U.S. law in effect at the time of the export.

Certification (1) of the bill requires that the verification of peaceful uses on export items will be essentially equivalent to IAEA INFCIRC-66-Rev. 2 safeguards. One way of satisfying this certification could be PRC's voluntary offer for IAEA safeguards. Although the voluntary offer still has to be negotiated, executive branch officials stated that U.S. nuclear exports approval could be years away (but NRC believes license applications might be sooner).

Certification (b)(1)(A) of the resolution requires the President to certify to the Congress that the "reciprocal arrangements" (consultations) of the agreement be designed to effectively ensure that U.S. exports be used solely for peaceful purposes. Unlike the bill, this certification would not require IAEA or equivalent safeguards. In addition, the resolution

APPENDIX II

would be more acceptable to the Chinese and the executive branch because it leaves undefined the "mutually acceptable arrangements for exchanges of information and visits." The resolution, as well as the bill, leaves unanswered the role of the Congress in defining or approving these exchanges.

Certification (2) of the bill, that the PRC recognizes that the agreement neither favorably nor unfavorably disposes the United States toward consent rights, would address concerns on predisposition. The PRC might refuse to communicate this understanding as it is not a U.S. export review requirement.

Certification (b)(1)(C) of the resolution, requiring the President to certify that the United States is not prejudiced to respond favorably to the PRC, does not require an answer from PRC on its interpretation of U.S. consent rights. The bill calls for such a response. It is likely both the executive branch and PRC would prefer the resolution language because it requires no action from the Chinese. Both the bill and resolution leave the following issues unresolved: (1) the undefined terms and phrases not found in other agreements, which could lead to misinterpretations and misunderstandings between the United States and the PRC, and (2) the vague wording which could imply that new standards or guidelines are being set for the U.S. right of approval process beyond the NNPA.

Certification (3) of the bill, that the PRC provide a public, written, detailed statement of its nonproliferation policy, would probably not address concerns over PRC nonproliferation credentials. There is no requirement in the NNPA or precedent in other agreements for this type of action on the part of either party to an agreement, according to executive branch officials. Even if the PRC did comply, policy statements would not address allegations of illicit Chinese nuclear behavior contrary to section 129 of the Atomic Energy Act, as amended. (Section 129 specifies conduct which would result in the termination of nuclear exports.) Executive branch officials argue that the time interval between agreement approval and actual exports will allow the United States to observe PRC actions before issues such as reprocessing must be addressed.

According to executive branch officials, the PRC almost certainly would not provide such a statement at U.S. insistence.

Certification (b)(1)(B) of the resolution, calling for additional information about PRC nonproliferation policies and the relationship of these policies to section 129 of the Atomic Energy Act, is less stringent than S. 1754. The resolution requires the President to certify that the PRC has provided further information concerning its nonproliferation policies and that the U.S. government can make a decision on PRC nonproliferation credentials before export licenses will be granted under the agreement. We believe that this certification in the resolution, coupled with the requirement discussed below

APPENDIX II

that provides for an executive branch report on PRC nonproliferation policies and actions, would help decision makers obtain adequate information on PRC nonproliferation policy.

Both certification (4) of the bill and section (c) of the resolution stipulate that all exports under the agreement are subject to the U.S. laws in effect at the time of such exports. Executive branch officials said that the PRC recognizes that this is the U.S. position. At the same time, the PRC holds to the principle of international law expressed in sentence 3 of article 2, section 1, which precludes U.S. legal justification for nonperformance of agreement provisions based on changes in internal law. Since the executive branch has already affirmed its belief that the agreement stipulates exports will be subject to U.S. law at the time of export, we believe the resolution's wording, which does not include the bill's requirement for a mandatory communication from the PRC, would be preferred, both by the executive branch and the PRC. The resolution leaves unanswered the question of whether the Chinese interpret article 2, section 1, as releasing them from compliance with future U.S. nuclear export laws.

Section (b)(2) of the resolution, which requires the President to submit a report on PRC nonproliferation policy and history, does not appear in the bill. This requirement brings special attention to PRC's nonproliferation policies and actions because, regardless of any other legal provisions or international agreements, no export license may be issued until the report has been submitted. In connection with certification (b)(1)(B), this requirement may foster congressional examination of PRC nonproliferation policies and actions.

The resolution, which also provides in section (d) that nothing in the agreement or the resolution may be construed as providing a precedent or other basis for the negotiation or renegotiation of any other agreement for nuclear cooperation, is also not in the bill. We believe that this provision could provide assurances that the agreement would not be viewed as precedent setting.

* U.S. Government Printing Office : 1986 - 491-237/46044